LU DING HUA

v.

LU DING SING

HIGH COURT BORNEO, SIBU
TUAN STEVE L.K. SHIM J.
[SUIT NO. 76 OF 1985]
13 MAY 1994

LAND LAW: Defendant appointed administrator of deceased's estate - Estate includes four parcels of land - Plaintiff claiming to be entitled to one parcel of land under memorandum executed by deceased - Defendant disputing plaintiff's claim on the grounds that plaintiff had signed agreement that she would be entitled to only $^1/_8$ share of the land - Plaintiff seeking declaration that memorandum valid and that defendant be required to transfer the land to her.

PROBATE & ADMINISTRATION: Whether memorandum could be construed as a will - Whether elements necessary to constitute a will present.

EVIDENCE: Failure by defendant to call material witnesses - Effect.

The plaintiff and the defendant are the adopted children of one Lu Hing Leng, deceased. The defendant was granted letters of administration of the estate of the deceased on an application made to the District Officer. The estate of the deceased comprised of four parcels of land. The plaintiff claimed that the deceased had executed a memorandum (P1) on 23 July 1972 expressing a wish to convey one of the parcels of land consisting of 4.76 acres (the Land) to her upon his demise.

The defendant denied the plaintiff's claims and relied upon an agreement (D1) alleged to have been struck between the plaintiff and the defendant that the plaintiff would only be entitled to claim $^1/_8$ share of the Land with the remaining $^7/_8$ share to be retained by the defendant.

The plaintiff sought a declaration that P1 dated 23 July 1972 is valid and to require the defendant to transfer the Land mentioned in P1 to the plaintiff. The other question that arose was whether P1 fulfilled the prerequisites to be considered a will.

Held:

[1] Although the defendant has in his pleadings denied the existence of P1 and questioned its validity and authenticity, he has made no attempt, by way of evidence, to sustain his contention. By his conspicuous failure to challenge or dispute the testimonies of the plaintiff and her witnesses on this issue, the Court is entitled to accept the evidence of the plaintiff that her adopted father did infact make out a memorandum in the terms stated therein.

[2] In the light of P1, which expressly allowed the plaintiff possession of 4.76 acres of land, it did not make sense for her to agree to accept only $^1/_8$ share of it as stated in D1. It has not been proved nor does the evidence in any way suggest that the plaintiff was prompted or induced to accept the offer or agreement on some kind of understanding that she would receive some compensation or remuneration or some shares in the rest of the estate left by the deceased.

[3] Evidence has been led that the alleged agreement on page 2 of D1 was recorded by a Sarawak Administrative Officer (SAO). As the defendant has placed great emphasis on the alleged agreement, the onus was on him to call for the attendance of the SAO in question. The fact that the defendant did not, when he should have done so, must therefore cast some doubt on the strength and authenticity of the alleged agreement.

[4] Although the plaintiff's name appears on pages 1 & 2 of D1, when examined more closely and on a comparative basis, it was quite obvious that the handwriting is rather different in both cases. On the evidence, the defendant has not established with any degree of certainty that the plaintiff had infact signed on page 2 of D1.

[5] Although the defendant has testified that the alleged agreement was made in the presence of two witnesses, neither of them had been called to give evidence and no explanantion has been forthcoming for their absence. The ommission to call these two witnesses on such an important issue must have the added effect of militating against the authenticity of the alleged agreement.

[6] The notation made by the District Officer on D1 tends to corroborate the testimony of the plaintiff who had said *inter alia* that when she realised that she was not to inherit anything from her father's estate, she had gone back to see the District Officer drawing his attention to the existence of P1 and/or the terms therein.

[7] On the whole of the evidence it is more than probable that there was no agreement made by

the plaintiff that she was prepared to accept $^1/_8$ share of the Land as reflected in D1. That being the position the question of estoppel as alleged by the defendant does not really arise.

[8] While there is sufficient evidence that the Land was to be inherited by the plaintiff upon the death of the deceased, the memorandum could not be constitute a will *stricto sensu*, as the said memorandum was witnessed by only one person and in the circumstances it did not possess all the elements necessary to constitute a valid will.

[9] However, on the evidence, it is reasonable to assume that the deceased's expressed wish, to convey the Land to the plaintiff upon his demise, had continued to subsist on his death since he had made no attempt at all to revoke or amend the terms of P1 from the time he made it on 23 July 1972 until his death on 7 November 1983. In the circumstances the plaintiff should be granted the declarations prayed for as it has not been shown that such an exercise would have gone against Chinese customs or norms.

[Plaintiff's claim allowed with costs. Defendant ordered to transfer the Land to the plaintiff within a reasonable time].

Cases referred to:
Re Ijot binti Beliku [1966] 1 MLJ 22 ***(refd)***
Tay Lim Tiang: Tay Sok Ann v. Tay Sok Hiong & Anor. [1955] SCR 17 ***(foll)***

Legislation referred to:
Wills Act 1959

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 50.

For the plantiff - Michele Lau; M/s. Lau & Co.
For the defendant - Ting Sing Chuan; M/s. Yong & Wong

JUDGMENT

Steve L.K. Shim J:
This case involves a family dispute concerning land. It is a case of an elder sister bringing an action against her younger brother. In her statement of claim, the plaintiff sister has prayed for (a) a declaration that a memorandum dated 23 July 1972 is valid and (b) that the defendant brother be required to transfer the property mentioned in the said memorandum to the plaintiff. At the outset, I should state that there is no dispute that Lu Hing Leng had died intestate on 7 November 1983 leaving behind him 2 adopted children namely Lu Ding Hua, the daughter, and Lu Ding Sing, the son, and 4 parcels of land including the one parcel of land consisting of 4.76 acres and discribed as Bintangor Lease of Crown Land No. 23801 (hereinafter referred to as "the said land"). Not unnaturally, therefore, the issue of the division of the said land soon came to a head as between the daughter and the son.

The daughter Lu Ding Hua who is the plaintiff has staked her claim to the said land by invoking the existence of memorandum alleged to have been made by her adopted father Lu Hing Leng on 23 July 1972, purporting to express a wish or desire to convey the said land to her upon his demise. It should be noted here that although the defendant has in his pleadings denied the existence of such a memorandum and questioned its validity and authenticity, he has made no attempt, by way of evidence, to sustain his contention. Indeed, by his conspicuous failure to challenge or dispute the testimonies of the plaintiff and her witnesses on this issue, the Court is therefore entitled to accept the evidence of the plaintiff that her adopted father Lu Hing Leng did infact make out a memorandum on 23 July 1972 in the terms stated therein. This memorandum exhibit P1 was prepared by one Lau Ing Ho PW1 at the request of Lu Hing Leng, the English translation of which states as follows:

> I work hard in my life until I possess land. At present I possess four parcels of land of which one parcel containing 4.76 acres. I willingly give this parcel containing 4.76 acres to my daughter Lu Ding Hua and no other person can interfere.

Now, it is the plaintiff's case that soon after the death of her adopted father Lu Hing Leng on 7 November 1983, she and her brother the defendant went to the district office, Bintangor, for the purpose of applying for letters of administration in respect of their father's estate which had then consisted of 4 parcels of land covering an area of 24.76 acres more or less; that later, when the plaintiff realised that she would not inherit anything from the estate, she went to see the district officer, Bintangor bringing to his notice the existence of the memorandum exhibit P1. Acording to the plaintiff, as the defendant did not agree to the terms of the said memorandum, the district officer had then advised that the matter be settled in Court. Thereafter, the

plaintiff consulted Messrs. Lau & Co., Advocates with a view to commencing action against the defendant for *inter alia* the transfer of the said land to her. In the meantime, she had caused a caveat to be lodged on the said land.

The defendant has denied the plaintiff's claims. The main thrust of his defence as disclosed in his pleadings as well as the evidence *viva voce*, is essentially a reliance upon an agreement alleged to have been struck between the plaintiff and the defendant that the plaintiff would only be entitled to claim $^1/_8$ share of the said land with the remainding $^7/_8$ share to be retained by the defendant. In this connection, the defendant has testified that 3 days after his father's death, he and the plaintiff had gone to the district office, Bintangor, accompanied by his cousin one Lu Huat Tung and Mr. Teng the Kapitan China of Bintangor; that while at the said office, he and the plaintiff had apparently signed a document which purported to contain an agreement whereby $^1/_8$ share of the said land was to be given to the plaintiff and $^7/_8$ share thereof be given to the defendant. The defendant has produced this document through Mr. Maurice Bujang DW4 the present district officer of Meradong. The document has been marked as exhibit D1.

There are a number of salient features concerning this alleged agreement which need to be considered. First, I think it is perfectly proper to pose the question as to why the plaintiff should, in the light of the memorandum exhibit P1 which expressly allowed her possession of 4.76 acres of land, decide to agree with accepting only $^1/_8$ share of it. It does not make sense. It has not been proved nor does the evidence in any way suggest that she was perhaps prompted or induced to accept the offer or agreement on some kind of understanding that she would receive some compensation or remuneration or even some shares in the rest of the estate left by the deceased intestate. Nor can it be suggested that under chinese custom, she would not normally have been entitled to anything in such a situation. In the absence of evidence, it is not unreasonable I think to assume that the plaintiff could not possibly have agreed upon accepting merely a $^1/_8$ share of the said land. Secondly, evidence has been led that the alleged agreement on page 2 of exhibit D1 was recorded by a Sarawak Administrative officer or SAO one Mr. Tan Chuan Tang. I would have thought it significant to have called this person in order to ascertain more fairly and fully what actually transpired between the plaintiff and the defendant at the material time and whether infact the plaintiff had signed therein indicating clearly her acceptance of the said agreement, etc. The importance and significance of calling him should have been self-evident to the defendant and/or his Counsel. There is no indication that this person was unavailable as a witness or that he was indisposed in any way. According to Mr. Thomas Iboh DW5, Mr. Tan is apparently based in Simunjan and so the question of his unavailability or indisposition does not, on the face of it, arise. In any event, no attempt has been made to locate him. As the defendant has placed great emphasis on the alleged agreement, the onus would have been on him to call for the attendance of the SAO in question. The fact that the defendant did not, when he should, must therefore cast some doubt on the strength and authenticity of the alleged agreement. Thirdly, although the name of the plaintiff appears below the alleged agreement on page 2 of exhibit D1, there is no clear indication that she had infact written it or signed it. It should be noted that the plaintiff's name appears on pages 1 and 2 in exhibit D1 and when they are examined more closely and on a comparative basis, it does appear quite obvious, even to a layman, that the handwriting is rather different in both cases. I do not think that, on the evidence, the defendant has established with any degree of certainty, that the plaintiff had infact signed on page 2 in exhibit D1 which would have indicated clearly that she had agreed to accept $^1/_8$ share of the said land. I need also mention here that although the defendant has testified that the alleged agreement was purportedly made in the presence of one Lu Huat Tung and Mr. Teng, the Kapitan China, these two persons have not been called as witnesses and no explanation has been forthcoming. In such an important issue as this alleged agreement is to the defendant, it does seem odd that the defendant should have omitted to call them. This must conceivably have the added effect of militating against the authenticity of the alleged agreement. And fourthly, there is incontrovertible evidence that Mr. Thomas Iboh DW5, the district officer who issued the relevant letters of administration, was not present when the plaintiff and the defendant went to the district office, Bintangor, soon after their father's death. When he is referred to page 2 of exhibit D1, DW5 concedes to making the following remark or notation:

> NB. Female .... approached D.O. to-day reguesting that one land to be given to her by L/A holder after L/A has been issued as was agreed and instructed by late father.

According to DW5, he made this notation on 4 June 1984. 1 think it is more than probable or likely that this notation was made as a result of the plaintiff approaching the district officer end conveying to the latter the terms of the memorandum exhibit P1. This can be inferred from the words "instructed by late father". This tends to corroborate the testimony of the plaintiff who has said *inter alia* that when she realised that she was not to inherit anything from her father's estate, she had gone back to see the district officer drawing his attention to the existence of the memorandum exhibit P1 and/or the terms therein. In this connection, Mr. Ting for the defendant has posed the question as to why the plaintiff had not bothered to inform the SAO of the existence of this memorandum at the time she and her brother went to the district office for the purpose of applying for the relevant letters of administration and why she had to wait apparently until 4 June 1984 before bringing the said document to the district officer's attention. Here, I think the following piece of evidence by the plaintiff is significant and revealing:

> My brother the defendant knew of the existence of this document after his return home. This document was kept by me but my father did inform my brother of its existence.

Evidence has been led that the memorandum exhibit P1 was made on 23 July 1972 when the defendant had apparently left his father's house. It has been alleged that he went underground but by 1973, he had returned home. The above evidence has not been disputed or challenged by the defendant. The Court is therefore entitled to accept it as having cogency and credibility. In the light of such evidence, it would seem that the defendant had already known of the existence of the said memorandum and or its terms at the time he was applying for the relevant letters of administration. If the defendant had known of it at the material time, why should there be a necessity for the plaintiff to have drawn the district officer's attention to it? It is perfectly reasonable to expect her to leave the matter to the defendant who, judging from the affidavit exhibit D2 in support of the application for the letters of administration, appears to be the main if not the sole applicant. Indeed, he eventually became the appointed administrator of their father's estate. According to the plaintiff, 2 weeks after she and her brother had gone to the district office, Bintangor, she went there again bringing with her the memorandum exhibit P1 which she showed to the district officer or the SAO. This has not been disputed. It is hardly a contradiction of the evidence which indicates that on 4 June 1984 she might have seen Mr. Thomas Iboh DW5 concerning the said memorandum, etc. In the circumstances, I do not think Mr. Ting's contention has any merit whatsoever.

In summary, on the whole evidence and for the reasons given, it is more than probable that there was no agreement made by the plaintiff that she was prepared to accept $^1/_8$ share of the said land as reflected in probate matter no. 51/83 in exhibit D1. That being the position the question of estoppel as alleged by the defendant does not really arise.

Mr. Ting has in his submission raised a number of ancillary issues namely that the plaintiff has no cause of action for failure to sue the deceased's estate; that the alleged memorandum exhibit P1 is an incomplete gift and hence ineffectual in law to pass any interest to the plaintiff. These issues have, for some unexplained reasons, not been pleaded in the statement of defence. It is therefore unnecessary to deal with them. Indeed, they ought not to be considered.

En passant, I think it appropriate to discuss briefly the evidence of Mr. Thomas Iboh DW5, the district officer who issued out the letters of administration to the defendant. He has testified *inter alia* that before issuing the said letters, he must have been satisfied that there was an agreement by the surviving heirs as to the division of the property concerning probate matter No. 51/83. I think the use of the phrase "I must have been satisfied" is rather vague and connotes an element of uncertainty. Furthermore, this part of his evidence is questionable because by the time he issued out the relevant letters of administration by signing therein on 13 August 1984, he would already have knowledge of the dispute between the plaintiff and the defendant regarding the division of the said land. Afterall, was it not on his admission that the plaintiff had personally approached him on 4 June 1984 drawing his attention to the existence of the memorandum exhibit P1 and or its terms as reflected in the notation on page 2 of exhibit D1? In the circumstances, I am not

inclined to accept his allegation that he must have been satisfied that the plaintiff and the defendant had agreed to the division of their father's property *vide* probate matter No. 51/83. Incidently, Mr. Iboh DW5 has, in his cross-examination, explained that division or distribution of the property in such a case should be the responsibility of the appointed administrator and not the concern of the district officer as the probate officer. I am therefore inclined to think that it was in this context that DW5 had issued out the letters of administration to the defendant. It is rather strange to note however that DW5's testimony on this score is somewhat different to that given by Mr. Maurice Bujang DW4, the present district officer of Meradong who has testified in effect that in issuing the letters of administration, the district officer as the probate officer should satisfy himself as a matter of course that there has been an agreement among the surviving heirs or beneficiaries as to the division of the assets of the deceased dying intestate. This is obviously the sort of practise which the Court in *Re Ijot binti Beliku* [1966] 1 MLJ 22 had found unsustainable in law. In that case, there was a dispute between 2 persons as regards the division of land left by a person dying intestate. The probate officer, Sibu, purported to conduct an inquiry into their rights and thereafter ordered that the land be divided equally between the two. He then issued out the letters of administration. It is significant to cite the following passage in the judgement of the Court:

> In my view the said Ordinance (and in particular s. 4) does not clothe the probate officer with power to make such an order as the one he made on 25 August 1962. The exercise of such power is tantamount to the making of a declaration of the rights of persons interested in the estate. The probate officer could exercise his discretion to administer the estate only if there is no person competent or willing to administer the same ...
>
> The dispute was clearly improperly brought before the probate officer who should have declined to assume jurisdiction. It would have been better if he concerns himself as to whom the letters of administration should be granted. Once that is done he may advise the person to whom the letters of administration had been granted of the provisions under s. 29 of the said Ordinance ...
>
> However, in my judgement I consider the order made by the probate officer dated 25 August 1962 was *ultra vives*. That order will therefore be quashed.

From the excerpt above, it seems clear therefore that the Court was of the view that the probate officer had exceeded his jurisdiction in purporting to hold the inquiry into the rights of the beneficiaries as to the estate of the person dying intestate and ordering the division of the said estate.

Before me, it has been submitted by Miss Lau for the plaintiff that the deceased Lu Hing Leng had intended the memorandum exhibit P1 to be his will rather than an immediate transfer of land; that it was not meant to be a gift *inter vivos* because the deceased had not, in his life time, taken any step to transfer and register the said land in favour of the plaintiff. There is sufficient evidence, which I accept, that the said land was to be inherited by the plaintiff upon the death of the deceased Lu Hing Leng. But can the said memorandum exhibit P1 be regarded as a will in law? It is trite law that the basic elements necessary to constitute a will are:

(a) that the testator is mentally fit and capable;
(b) that the testator must sign the will;
(c) that the testator's signature has to be witnessed by 2 or more witnesses who must be present at the time the testator signed it;
(d) that the will must be in writing though it need not be in any particular form; and
(e) that there must be no undue influence brought to bear on the testator.

See Wills Act (Act 346): **Halsbury's Laws of England,** 4th Edn. Vol. 50. A beneficiary is not to be regarded as a witness.

Here, the memorandum exhibit P1, although signed by the deceased Lu Hing Leng was witnessed by only one person namely Tang Siong Hung. It was prepared by one Lau Ing Ho, an old friend of the deceased. The strict requirements under the law have not been complied with. It cannot therefore constitute a will *stricto sensu*. However, the said memorandum is clear testimony of the deceased's intention or wish to convey the said land consisting of 4.76 acres and described as Bintangor Lease of Crown Land no. 23801 to the plaintiff. The fact that the deceased had taken no steps at all to revoke or amend the said memorandum during his lifetime and when he had ample opportunity to do so, is clear

indication that he wanted the said memorandum to subsist upon his demise. The question now is whether this Court should give effect to the expressed wish or desire of the deceased intestate in terms reflected in the said memorandum exhibit P1. In this regard, it may not be inappropriate to refer to a passage in the judgement of Blagden, J. in *Re Estate of Tay Lim Tiang: Tay Sok Ann v. Tay Sok Hiong & Anor.* [1955] SCR 17 which states:-

> ... the problem before the Court really resolves itself into deciding what is an equitable division of the Estate, bearing in mind so far as is allowable, the expressed wishes of the deceased, the rights and liabilities of the beneficiaries, the proper principles to be applied in administering an intestate's estate and the effect of any relevant chinese custom ...
>
> Although the will of Tay Lim Tiang has been declared invalid, nevertheless its existence as a document of record is clear evidence of the wishes of the deceased, expressed as it was before elders and notabilities of Simanggang ...
>
> I am satisfied that the proper course to take is to divide the estate as nearly as possible in accordance with Tay Lim Tiang's declaration expressed before the elders and evidenced by the document exhibit 'H', which, although invalid as a will under English law, is admissible in evidence as proof of a declaration under chinese custom ..."

I would adopt the stand taken in *Re Estate of Tay Lim Tiang, supra,* in the instant case because of the deceased Lu Hing Leng's expressed wish or desire to convey the said land to the plaintiff upon his demise and that on the evidence, it is reasonable to assume that his expressed wish or desire had continued to subsist on his death since he had made no attempt at all to revoke or amend the terms of the said memorandum exhibit P1 from the time he made it on 23 July 1972 until his death on 7 November 1983. Furthermore, it has not been shown that such an exercise would have gone against chinese custom or norms.

In the circumstances and for the reasons stated, I will order that the defendant do transfer the said land consisting of 4.76 acres and described as Bintangor Lease of Crown Land no. 23801 to the plaintiff within a reasonable time. Costs to the plaintiff to be taxed.

MBf FINANCE BERHAD

v.

EPCO MARINE SDN. BHD.

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY J.
[ORIGINATING SUMMONS 24 (31)-816-85]
15 APRIL 1994

PRACTICE & PROCEDURE: Order 42 r. 12 RHC - Application by defendants to amend or vary order of Court to reduce rate of interest to 8% per annum on judgment debt - Whether O. 42 r. 12 applicable to Court order made pursuant to s. 257 of the National Land Code.

PRACTICE & PROCEDURE: Appeal by defendants - SAR ordering that land be auctioned at reserve price based on valuation of government's valuer - Dispute on valuation of land - Whether decision of SAR proper.

LAND LAW: Public auction of land - Dispute on valuation - Conflicting valuation by defendants' valuers and government's valuer - SAR relying on valuation of government's valuer to fix reserve price - Contention that defendants should be allowed to cross-examine government's valuer - Authorities cited by defendants to support contention - Whether applicable - Whether SAR's decision proper.

The defendants filed two applications, the first to amend or vary a Court order to reduce the rate of interest on the judgment debt to 8% per annum on the principal sum due from 6 May 1956 until full realisation and the second was an appeal to the Judge in chambers against the decision of the Senior Assistant Registrar (SAR) ordering that the defendants' land be auctioned on 22 February 1994 at the reserve price of RM424,000.

With respect to the first application, the defendants contended that the pre 12 December 1986 amendment in O. 42 r. 12 of the Rules of the High Court 1980 (RHC) limiting the rate of interest to 8% per annum was applicable to them. The defendants cited three authorities in support of their contention. With respect to the appeal, the plaintiffs' valuer and the defendants' valuer had valued the land at RM275,000 and RM850,000 respectively. In view of the dispute the Court appointed independant valuers to appraise the land and fixed the reserve price at RM424,000 in accordance with the valuation. The defendants contended that as there was a wide difference between the valuation of the